

Message Text

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FM SECSTATE WASHDC

TO AMEMBASSY SAN JOSE

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E.O. 11652: N/A

TAGS: ECIND CS

SUBJECT: DISCRIMINATORY CONSTRUCTION LEGISLATION

REF: SAN JOSE 3056

1. FOLLOWING COMMENTS ARE OFFERED ON COSTA RICAN LAWS 5501 AND 5518 AND IMPLEMENTING REGULATIONS.

2. INITIAL READING OF ARTICLE 2DF LAW 5518 PRESENTS QUESTIONS AS TO LAWS' EFFECTS ON A.I.D. CONTRACTS, BOTH DIRECT AND A.I.D.-FINANCED. OBVIOUSLY AID WOULD HAVE SERIOUS PROBLEMS WITH ANY LAWS WHICH REQUIRE DISCRIMINATION IN FAVOR OF CERTAIN FIRMS SEEKING SUCH CONTRACTS. REQUEST EMBASSY CLARIFY COSTA RICAN INTERPRETATION OF ARTICULO 2 - "LAS DISPOSICIONES DE ESTA LEY Y LOS QUE LE SEAN COMPLEMENTARIAS, SE APLICARAN SIN PERJUICIO DE LO CONVENIDO EN CONTRATOS CON ENTIDADES INTERNACIONALES DE CREDITO." IN PARTICULAR:

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A. IS A.I.D. CONSIDERED TO BE AN "ENTIDAD INTERNACIONAL

DE CREDITO"?

B. IF IT IS, DOES THE ABOVE-QUOTED LANGUAGE MEAN THAT PROVISIONS OF LAWS WOULD NOT APPLY TO ANY CONTRACTS FINANCED BY A.I.D. (WHETHER OR NOT A.I.D. IS A PARTY)?

DOES IT MEAN THAT ESCALATOR CLAUSES MAY NOT BE USED IN SUCH CONTRACTS; OR DOES IT PERMIT SUCH CLAUSES IN SUCH CONTRACTS REGARDLESS OF CONTRACTOR NATIONALITY?

3. ASIDE FROM A.I.D. CONCERNS, AS WRITTEN, LAW IS POTENTIALLY DISCRIMINATORY AGAINST FOREIGN FIRMS, BUT DOES NOT APPEAR TO APPLY RETROACTIVELY; E.G., TO EXISTING

CONTRACTS. IS THIS CORRECT? WE HAVE LOOKED AT U.S.-COSTA RICA FRIENDSHIP COMMERCE AND NAVIGATION TREATY OF JULY 10, 1851 (RS 62; 6 BEVANS 1011) AND CONCLUDE THAT PREFERENTIAL TREATMENT ESTABLISHED HERE FOR NATIONAL CONTRACTORS IS NOT A VIOLATION OF TREATY PROVISIONS.

4. CLARIFICATION WOULD ALSO BE WELCOME ON WHETHER ON NON-A.I.D. RELATED CONTRACTS, LAWS WILL PRECLUDE NEGOTIATIONS BY FOREIGN CONTRACTORS OF THEIR OWN ESCALATOR CLAUSES. OR, IF CONTRACT RESULTS FROM BIDDING, WOULD BID DOCUMENTS CONTAIN ESCALATOR CLAUSE AND THEN PROHIBIT BID BY FOREIGN FIRM; OR WOULD BID DOCUMENT PROVIDE THAT ESCALATOR CLAUSE WOULD NOT BE APPLICABLE TO FOREIGN FIRM

BIDDER? (OBVIOUSLY, IN ABSENCE OF ESCALATOR CLAUSE, FOREIGN FIRM WOULD BUILD INTO BIDS ANTICIPATED PRICE INCREASES. THIS COULD AFFECT THEIR ABILITY TO COMPETE WITH LOCAL FIRMS.)

5. REGARDING THE TRANSITORY PROVISION OF LAW 5518 REQUIRING NATIONAL AND FOREIGN FIRMS ALIKE WITH EXISTING CONTRACTS TO APPLY FOR THE BENEFITS OF LAW 5518, WE WOULD FIRST LIKE TO KNOW WHETHER THE REGULATIONS HAVE GONE INTO EFFECT. IF TIME PERMITS, EMBASSY SHOULD CONSIDER EFFORTS TO INFORM U.S. CONSTRUCTION FIRMS WITH EXISTING CONTRACTS TO REGISTER SO AS TO RECEIVE BENEFITS OF THE PROVISION.
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